IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF NORTH CAROLINA

THOMAS KRAKAUER, Plaintiff, v. DISH NETWORK LLC, Defendant.	Case No. 1:14-CV-00333-CCE-JEP **Oral Argument Requested**

BRIEF IN SUPPORT OF DEFENDANT DISH NETWORK L.L.C.'S MOTION FOR A NEW TRIAL

TABLE OF CONTENTS

Page

DISH Network L.L.C. ("DISH") submits this motion contemporaneously with its Rule 50(b) renewed motion for judgment in its favor as a matter of law and respectfully makes an alternative request for a new trial pursuant to Fed. R. Civ. P. 59.

I. THE FOURTH CIRCUIT STANDARD FOR A NEW TRIAL

Following a jury trial, the Court may, on motion, grant a new trial "on all or some of the issues . . . for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a)(1)(A). A new trial should be granted if the verdict (1) is against the clear weight of the evidence, (2) is based on evidence which is false, or (3) will result in a miscarriage of justice, even if there is substantial evidence that would prevent a directed verdict. *Cline v. Wal-Mart Stores, Inc.*, 144 F.3d 294, 301 (4th Cir. 1998). The first two prongs require the Court to make factual determinations, while the third prong is more "policy-related," so the "judge's unique vantage point and day-to-day experience with such matters lend expertise and consistency." *Atlas Food Sys. & Servs., Inc. v. Crane Nat. Vendors, Inc.*, 99 F.3d 587, 594 (4th Cir. 1996). In assessing a motion for new trial, the Court should exercise its "own independent judgment after a weighing of all the evidence and any other pertinent factors in determining whether the verdict was against the clear weight of the evidence or would result in a miscarriage of justice." *Williams v. Nichols*, 266 F.2d 389, 393 (4th Cir. 1959).

II. A NEW TRIAL IS WARRANTED BECAUSE THE VERDICT IS AGAINST THE CLEAR WEIGHT OF THE EVIDENCE

The Rule 59 standard for a new trial is different from that of Rule 50, and affords

the Court "wider" discretion to evaluate the weight of the evidence. *McCracken v. Richmond, F. & P. R. Co.*, 240 F.2d 484, 488 (4th Cir. 1957) (setting aside a directed verdict and remanding for trial). Under the Rule 50 standard, for all of the reasons stated in DISH's contemporaneously filed 50(b) motion, which DISH incorporates here by reference, no reasonable jury could have found a legally sufficient evidentiary basis for the verdict in this case. For those same reasons, under the less stringent Rule 59 standard, the verdict is against the clear weight of the evidence, warranting a new trial.

III. A NEW TRIAL SHOULD BE GRANTED BASED ON NUMEROUS PREJUDICIAL ERRORS AT TRIAL

Substantial errors in the admission or rejection of evidence or instructions to the jury, and misconduct by counsel during closing arguments, are valid grounds for a new trial. *See, e.g.*, *Ray v. Allergan, Inc.*, 863 F. Supp. 2d 552, 567 (E.D. Va. 2012) (new trial "only remedy" where prohibited arguments by counsel, and jury instructions on core issue, caused prejudice). Ultimately, a trial court "should exercise its discretion to grant a new trial 'whenever, in its judgment, this action is required in order to prevent injustice.'" *Whalen v. Roanoke Cty. Bd. of Sup'rs*, 769 F.2d 221, 226 (4th Cir. 1985), *on reh'g*, 797 F.2d 170 (4th Cir. 1986) (quoting 11 Wright & Miller, Federal Practice and Procedure § 2805 at 38 (1973)). A new trial is necessary to prevent injustice in this case.

A. DISH Respectfully Submits That the Court Made Erroneous and Prejudicial Evidentiary Rulings

1. Erroneous Admission of Prejudicial Prior Bad Act Evidence

Before trial, the Court denied DISH's motion to preclude evidence regarding SSN's alleged prerecorded telemarketing violations from 2004 to 2005. The Court ruled

that the evidence was "relevant to the agency issue to the extent the violations were known or should have been known by Dish." Doc. 222 at 4. First, DISH's knowledge of alleged prerecorded calls in 2004 to 2005 is not relevant to whether SSN was DISH's agent under an actual authority theory. Second, DISH's knowledge of alleged violations in 2004 to 2005 is not relevant to whether SSN acted within the scope of any authority from DISH five to seven years later when SSN made the calls at issue. *See, e.g.*, Doc. 293 at 4 (asking whether SSN was "acting as Dish's agent *when it made the telephone calls at issue from May 11, 2010 through August 1, 2011*") (emphasis added). Plaintiff presented *zero* documents from the class period showing DISH's knowledge of any illegal telemarketing behavior by SSN, and only *two* consumer do-not-call complaints in the years before the class period, both of which showed that DISH investigated and objected to any violation of the telemarketing laws. DX 8; PX 52.

Plaintiff made the 2004-2005 time period the centerpiece of his case. Plaintiff's counsel read nearly every line contained within various 2004-2005 emails during his examination of Amir Ahmed, which spanned approximately 40 pages of transcript, prompting the Court to direct Plaintiff's counsel to "get through this and get to a more relevant time frame." Jan. 11, 2017 Tr. at 149:8-166:14; 170:18-191:9; 181:1-4. At the conclusion of Mr. Ahmed's examination, the Court stated that "Defendant has some very good points here about Rule 403" and referred to the 2004-2005 time period as "not the crux of the case, not the most relevant time frame." *Id*. at 194:4-14. Plaintiff nonetheless doubled down at closing, returning time and again to 2004-2005. He implored the jury to punish DISH for SSN's conduct in 2004-2005, as opposed to the conduct at issue in the

case, telling the jury that "[a]ctions speak louder than words. These guys get in all this trouble in 2004, in 2005. . . . What are you telling companies if you let DISH skate with all this eyes-open knowledge . . . ?"[1] Jan. 18, 2017 Tr. at 26:4-16.

Plaintiff's exploitation of the 2004-2005 evidence at trial makes clear that DISH's motion *in limine* should have been granted. The 2004-2005 SSN conduct that Plaintiff harped on before the jury is improper character evidence, unduly prejudicial, and only marginally relevant, at best.[2] Under the applicable test for admissibility of prior acts, the prior act must be "similar" in "time, pattern, or state of mind," and its probative value must not be substantially outweighed by confusion or unfair prejudice. *U.S. v. McBride*, 676 F.3d 385, 396-97 (4th Cir. 2012). The alleged 2004-2005 violations that Plaintiff emphasized are not sufficiently similar to the conduct at issue and, in any event, are too temporally remote to be relevant in this case. The few complaints that DISH received relating to SSN's 2004-2005 conduct—which DISH raised with SSN and objected to—related to prerecorded messages, an act that differs in both motivation and methodology from failing to scrub dialing lists against the Registry. *See U.S. ex rel. Davis v. U.S.*

[1] This statement is merely one example of many closing argument statements in which Plaintiff's counsel implored the jury to hold DISH liable based on events from 2004-2005. *See also* Jan. 18, 2017 Tr. at 22:10-17; 24:19-21; 25:13-16; 26:6-10; 28:11-19.

[2] This conduct encompasses evidence relating to 2005 settlements obtained by North Carolina and Florida against Vitana Corporation, a d/b/a of SSN. DISH moved to exclude that evidence separately, which the Court also erroneously denied. DISH also timely objected to the introduction of each exhibit at trial. *See* PX 1160 (Jan. 11, 2017 Tr. at 150:7-16); PX 656, PX 194, PX 504 (Jan. 11, 2017 Tr. at 154:17-155:22; 156:3-13; 183:12-13); PX 120 (Jan. 11, 2017 Tr. at 181:10-16); PX 503 (Jan. 12, 2017 Tr. at 117:13-23); PX 186 (Jan. 11, 2017 Tr. at 164:4-6); PX 191 (Jan. 12, 2017 Tr. at 63:24-64:3).

Training Ctr. Inc., 498 F. App'x 308, 318 (4th Cir. 2012) (prior act of paying alleged bribes to Afghani officials not relevant to claims of overbilling the government).

As the Court recognized, the more time devoted to marginally relevant prejudicial evidence, the greater the prejudice. Jan. 11, 2017 Tr. at 86:16-17 ("Defendant's concerns are legitimate if you spend too much time on it."). The extensiveness of Plaintiff's presentation and argument magnified the prejudice, overwhelming any possible relevance. In similar circumstances, the Fourth Circuit vacated a judgment against the defendant where the plaintiffs "relied heavily on [prior bad acts evidence] in closing argument, in which they alleged that [defendant] had a pattern and practice of dishonesty that had to be stopped."[3] *Fisher v. Am. Gen. Fin. Co.*, 52 F. App'x 601, 606–07 (4th Cir. 2002); *see also Sparks v. Gilley Trucking Co.*, 992 F.2d 50, 51–53 (4th Cir. 1993) (reversing for new trial because "jury heard detailed evidence about several prior [acts] . . . , and this evidence thus became an important aspect of [defendant's] presentation to the jury."). And as in *Fisher*, the size of the verdict here demonstrates that DISH was prejudiced by the evidence and that the error was not harmless. The $400 per call awarded by the jury shows that the jury improperly did exactly what Plaintiff's counsel asked it to do—assessing DISH with a hefty verdict based on the 2004-2005 events.

[3] The Court's decision to preclude DISH from quoting the trial transcript during its closing argument further compounded problems created by the erroneous evidentiary rulings. During his closing, Plaintiff's counsel advanced prejudicial arguments unhinged from the evidence, and to its detriment, DISH was unable to correct and contextualize these arguments with specific references to the trial transcript. *See, e.g.*, *U.S. v. Kuta*, 518 F.2d 947, 954 (7th Cir. 1975) (approving of counsel's use of transcript quotes during closing argument because it promoted accuracy and did not place undue emphasis of particular evidence).

2. Plaintiff's Violation of Ground Rules on Other Retailers and Government Enforcement Actions

At trial, Plaintiff continually resorted to improper references to other retailers and government enforcement actions, which the Court recognized would unfairly prejudice DISH.[4]

Plaintiff's counsel painted an ominous picture of government enforcement actions against DISH because of alleged serious, widespread problems with retailers, the only purpose of which was to inflame the jury over conduct that had nothing to do with SSN's 2010-2011 phone calls. Plaintiff specifically asked Dr. Krakauer whether the North Carolina Attorney General's office was present at his 2011 deposition, Jan. 11, 2017 Tr. at 17:7-8, solely to improperly signal to the jury that the deposition was taken in a government enforcement action. Plaintiff also improperly used the AVC as purported

[4] DISH moved *in limine* to exclude any reference to retailers other than SSN at trial, arguing that it was irrelevant and prejudicial. *See* Doc. 185. Plaintiff *agreed* not to offer evidence of other retailers' telemarketing violations during his case-in-chief, mooting DISH's motion. Doc. 204; June 3, 2016 Tr. at 103:23-104:8; Doc. 222 at 4. DISH also moved *in limine* to exclude references to *US v. DISH* and other legal proceedings or settlements. *See* Doc. 188. Both the Court and Plaintiff agreed that it would be unfairly prejudicial to say that DISH has been sued by the federal government in another matter, and accordingly, the Court limited the use of testimony in *US v. DISH* to cross examination. Doc. 222 at 5. The Court also limited references to that action as "a case involving Dish pending in Illinois," and precluded references to DISH being "sued by the federal government." *Id.* Finally, before trial, DISH moved to exclude the Assurance of Voluntary Compliance ("AVC") (PX 55) on the basis that it was prejudicial to allow Plaintiff to use a settlement document from an enforcement action by attorneys general. Jan. 6, 2017 Hearing Tr. at 10:2-15. The Court ruled that the AVC could only be offered on the issue of whether DISH had control over SSN's telemarketing, and instructed Plaintiff not to "go beyond that and say, you know, all these attorney generals said DISH did something wrong and in response DISH compromised." *Id.* at 22:10-20; *see also* Jan. 11, 2017 Tr. at 72:9-25.

evidence of widespread telemarketing problems and government enforcement actions. The Court allowed Plaintiff to state in questioning, over DISH's objection, that the "reason [DISH] must have had to have a settlement agreement with 46 states' attorneys general is because there were widespread problems with telemarketing, correct?" *Id.* at 80:10-16. After planting that seed, Plaintiff's counsel reinforced this prejudicial theme in closing, stating "after the North Carolina AG puts an injunction on him . . . after Florida gives the same sanction . . . then the AGs obviously did know because in 2009 these guys signed up with 46 of them to start policing this stuff. Obviously, the AGs found out about it." Jan. 18, 2017 Tr. at 23:12-20.

Later in his closing, Plaintiff's counsel tied the AVC and government enforcement actions to supposed "widespread issues." Counsel further argued that DISH should have presented evidence on disciplining retailers other than SSN, and that the absence of this evidence warranted a stiff verdict against DISH: "[t]here's no evidence in this case that any single OE retailer was actually disciplined. Where are the discipline letters? Where is the *choking back of any one of those 45 national sales partners*? Where is that evidence?" Jan. 18, 2017 Tr. at 93:24-94:2 (emphasis added). These repeated improper references to other retailers and government enforcement actions violated the ground rules for trial and significantly prejudiced DISH.

3. Erroneous Admission of Prejudicial Credit Check Evidence

During trial, Plaintiff's counsel repeatedly referred to evidence that SSN had run a credit check on Dr. Krakauer without his knowledge. PX 282. The only purpose of this evidence was to unfairly impugn DISH and SSN. At a pretrial conference, DISH moved

to exclude any reference to the credit check under Rule 403, as it had no relevance to the claims asserted in this case and was highly prejudicial. Dec. 12, 2016 Hearing Tr. at 59:18-22. Plaintiff claimed that it was relevant because it showed that DISH "is covering up misdeeds." *Id.* at 60:9-21. The Court agreed with DISH that this evidence could be prejudicial, but nonetheless allowed Plaintiff to use it only to show Dr. Krakauer's motivation in bringing this case. *Id.* at 61:24-62:10 ("I have some 403 concerns about that one."). Recognizing the potential for prejudice, however, the Court instructed Plaintiff to notify it *outside the jury's presence prior* to asking any questions on the credit check. *Id.* at 61:9-13. Plaintiff's counsel disregarded this instruction at trial and displayed PX 282 to the jury before it was in evidence and before approaching the bench to discuss his intended line of questioning. Jan. 11, 2017 Tr. at 18:8-20:14.

Then, instead of using the credit check as motivation evidence (*see* Jan. 11, 2017 Tr. at 22:9-27:8), Plaintiff's counsel repeatedly and improperly used it for the precise purpose that the Court had precluded under Rule 403—to claim that DISH "covered up" SSN's actions. Jan. 12, 2017 Tr. at 32:25-33:3 ("So then the decision . . . not to tell Dr. Krakauer about this in a way protected the national sales partner from being found out, right?"). During closing argument, Plaintiff's counsel made improper use of the credit check again, asserting in mock outrage that "[DISH was] covering up the improper act of their agent. When your agent does something wrong and you know it, if you're not standing behind it, why are you covering it up? Why are you covering it up? So that action of covering up speaks louder than words. Actions speak louder than words. They covered it up." Jan. 18, 2017 Tr. at 19:6-11. The Court's erroneous admission of the

credit check evidence was compounded by Plaintiff counsel's blatant disregard of the Court's instructions regarding the proper procedure for addressing and use of the evidence, which substantially harmed DISH's rights at trial.

4. Improper Preclusion of Fact Witnesses

The Court's ruling precluding Kenneth Sponsler of PossibleNOW and former DISH employee Holly Taber McRae from testifying as fact witnesses improperly deprived DISH of critical evidence. The Court found DISH's pretrial disclosures inadequate for these witnesses, but Plaintiff had not even sought to preclude Mr. Sponsler from testifying as a fact witness and was well aware of Ms. McRae at the outset of the case. There was no risk of surprise or harm to Plaintiff from the testimony, and it should have been allowed. *See Russell v. Absolute Collection Servs., Inc.*, 763 F.3d 385, 396–97 (4th Cir. 2014).

DISH disclosed that a PossibleNOW representative would have "information regarding DISH's and/or SSN's actions regarding, relating to, or arising out of their do-not-call compliance efforts." Doc. 205-2. The omission of Mr. Sponsler's name as that PossibleNOW representative was harmless. There was no surprise to Plaintiff. Plaintiff indisputably expected that DISH would call Mr. Sponsler at trial, as he specifically moved to exclude any *expert testimony* from him. Doc. 183 at 15-16. But Plaintiff never sought to preclude Mr. Sponsler from testifying as a fact witness. *Id.* In response to Plaintiff's motion, DISH agreed that it only would offer fact testimony from Mr. Sponsler. Doc. 194 at 30. The Court improperly acted *sua sponte* to grant greater relief than Plaintiff sought on his motion and wholly precluded Mr. Sponsler from testifying at

trial.

In addition, Mr. Sponsler's testimony was substantially justified, as it was very important to DISH's case. *See S. Mgmt. Corp. Ret. Trust v. Jewell*, 533 F. App'x 228, 230 (4th Cir. 2013). DISH was entitled to present evidence from a PossibleNOW representative concerning the specific scrubbing and other compliance services and training that SSN utilized. Plaintiff's counsel capitalized on this error at trial to exacerbate the prejudice. During closing arguments, he asked the jury: "Why didn't a PossibleNOW witness come in here and spread scrubbing records all over the courtroom floor if these guys were using PossibleNOW? This is one record from 2008. That's the best DISH can do on their scrubbing with PossibleNOW." Jan. 18, 2017 Tr. at 28:3-7.

Similarly, there was no surprise to Plaintiff with respect to Ms. McRae. Based on Ms. Tehranchi's deposition testimony, as well as DISH's document production, Plaintiff was well-aware of Ms. McRae's critical role in the relationship between DISH and SSN. Dep. Tr. at 43:15-47:25; 50:22-56:1; 60:15-61:24; 68:2-7; 106:5-107:2; Doc. 212 at 2. Plaintiff himself attempted to depose Ms. McRae around March 2015 but elected not to go forward with the deposition. Doc. 212 at 2 & Doc. 212-1. DISH offered to make Ms. McRae available for a deposition months before the start of trial, which cured any potential prejudice. With the preclusion of Ms. McRae, DISH was deprived of an opportunity to rebut Ms. Tehranchi's erroneous statements that DISH employees visited SSN's offices daily, had access to the SSN call center and reviewed marketing scripts (as opposed to disclosures). Tehranchi Dep. Tr. at 45:1-15, 47:21-25, 68:2-9.

B. Refusal to Include a Scope of Authority Question on the Verdict Sheet

The question of whether an agent exceeded the scope of its authority is not subsumed within the threshold question of whether an agency relationship exists; it is an entirely separate inquiry that becomes relevant only after a threshold agency determination is made. Doc. 253 at 7. At trial, DISH submitted extensive evidence establishing that SSN acted outside the scope of any authority from DISH, and the Court acknowledged in ruling on DISH's Rule 50(a) motion that the evidence on whether SSN acted within the scope of authority was close. Jan. 13, 2017 Trial Tr. at 149:22-24. Despite the abundant evidence that SSN acted outside the scope of any authority, the Court declined to include this question on the verdict sheet.

A verdict sheet must not "mislead or confuse" the jury. *Scott v. Isbrandtsen Co.*, 327 F.2d 113, 119 (4th Cir. 1964); *Fox v. Dynamark Sec. Ctrs., Inc.*, 885 F.2d 864 (Table), at *6 (4th Cir. 1989) (ordering retrial where "the jury was both confused and misinformed to the prejudice of the defendants" based on jury instructions and verdict form used). Given the substantial trial evidence that SSN acted outside the scope of its authority, and for the reasons articulated in DISH's Rule 50(b) motion, the jury had to have been confused and misinformed to reach the verdict it did at trial. The "scope of authority" issue was buried within lengthy agency jury instructions, as well as within a generalized agency question on the verdict sheet. The omission of a separate question on the verdict sheet on this key issue misled and confused the jury on the scope of authority issue, to DISH's prejudice. The prejudice of this omission was further exacerbated by the other erroneous rulings that permitted Plaintiff to present improper and misleading

arguments that obscured the clear deficiency of proof that SSN acted within the scope of any purported agency.

C. DISH Respectfully Submits That the Court Made Erroneous and Prejudicial Rulings on Admission of Expert Testimony

1. Erroneous and Prejudicial Rulings on Ms. Verkhovskaya and Dr. Aron's Testimony

A motion for a new trial may be granted on the grounds that expert testimony was improperly admitted. *Persinger v. Norfolk & W. Ry. Co.*, 920 F.2d 1185, 1186 (4th Cir. 1990). Plaintiff's expert Anya Verkhovskaya should not have been permitted to (i) offer new opinions that were not disclosed in her expert report or deposition testimony, (ii) offer new bases for her opinions that had not previously been disclosed, and (iii) "correct" purportedly "mistaken" deposition testimony for the first time at trial.

Rule 26(a)(2)(B)(i) requires that expert reports contain "*a complete statement of all opinions the witness will express and the basis and reasons for them*." (emphasis added). Rules 26(a)(2)(E) and 26(e)(2) further provide that a "duty to supplement extends both to information included in the report and to information given during the expert's deposition. *Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due*." (emphasis added). Rule 37(c)(1) provides for preclusion of expert testimony that is not properly disclosed. "If a party fails to provide information . . . as required by Rule 26(a) or (e), the party is not allowed to use that information . . . at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1); *see also S. States Rack & Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 595–96 (4th Cir. 2003).

The test for whether undisclosed evidence is substantially justified or harmless is: (1) the surprise to the party against whom the evidence would be offered; (2) the ability of that party to cure the surprise; (3) the extent to which allowing the evidence would disrupt the trial; (4) the importance of the evidence; and (5) the non-disclosing party's explanation for its failure to disclose the evidence. *S. States Rack & Fixture, Inc.*, 318 F.3d at 596–97. Because the non-disclosure was neither substantially justified nor harmless, the testimony should have been precluded and stricken from the record.

Ms. Verkhovskaya provided an expert report dated January 30, 2015, which was amended and corrected on March 5, 2015. In that report, Ms. Verkhovskaya expressed the ultimate opinion that her "analysis . . . reveals that 20,450 unique telephone numbers were on the NDNCR *as of April 1, 2010*, at least 30 days prior to any Connected Calls, received more than one Connected Call in any 12-month period, [and] were *not identified as business telephone numbers* . . . ." Ex. A (Expert Report of Anya Verkhovskaya) at 10-11 (emphasis added). As the basis for her opinions, Ms. Verkhovskaya disclosed that she checked whether telephone numbers "were listed on the NDNCR as of April 1, 2010" with vendor Nexxa (Ex. A at 9); and after that removed telephone numbers assigned the disposition "Business" within the SSN call records or identified as business by vendor LexisNexis (Ex. A at 10). At deposition, Ms. Verkhovskaya testified that she only considered whether LexisNexis identified a telephone number as a business number, and did not consider other fields in the data that she received from LexisNexis, including (i) a residential column, (ii) a government column, and (iii) columns containing "begin" and

"end" date information. Ex. B (Verkhovskaya Deposition Excerpts) (Dep. Tr. at 110:7-11; 110:17-20; 116:20-117:16).

Ms. Verkhovskaya went far beyond those pretrial disclosures at trial. *First*, she improperly testified that she checked telephone numbers against the Registry *not only* "as of April 1, 2010" *but also through the end of class period*, because she claimed that Nexxa would have informed her by separate email if a telephone number had been removed from the Registry. Jan. 13, 2017 Tr. at 31:7-33:21. *Second*, she newly opined, *to a reasonable degree of certainty*, that all 20,450 telephone numbers were *affirmatively residential* at the time of the telephone calls (*id.* at 58:15-59:1), not simply "not identified as business numbers."[5] *Third*, she newly opined that LexisNexis has a comprehensive database of business numbers, rendering residential any number that it does not identify as business. Jan. 12, 2017 Tr. at 182:2-10. *Fourth*, she opined that all telephone numbers in the various categories set forth in the parties' trial stipulation are residential. Jan. 13, 2017 Tr. at 10:22-18:25.[6]

[5] This ultimate opinion that Ms. Verkhovskaya offered at trial is not contained anywhere in Ms. Verkhovskaya's report or deposition testimony. Ms. Verkhovskaya conceded that the residential opinion was not explicit but "assumed." Jan. 13, 2017 Tr. at 59:10-16. Plaintiff's counsel argued that the opinion appeared at page 1 of the report, in a description of the nature of Plaintiff's Count I allegations. But, Ms. Verkhovskaya did not herself recognize that paragraph as containing such an opinion, after spending approximately one half hour reviewing her own report to look for it. *Id.* at 66:18-67:10.

[6] In reaching that residential opinion, she asserted that she understood and affirmatively considered columns in the LexisNexis data that she had testified at deposition she did not understand or consider. Jan. 13, 2017 Tr. at 49:1-16, 93:4-94:16, 96:22-98:20. Ms. Verkhovskaya conceded that this trial testimony contradicted her deposition testimony. Notwithstanding Rule 26(e)'s requirements regarding any changes to the expert's disclosures, Ms. Verkhovskaya admitted that she changed her deposition testimony for

The jury relied on these new portions of Ms. Verkhovskaya's testimony to find that *all calls* at issue were made to residential telephone numbers on the Registry.

This previously undisclosed testimony surprised and prejudiced DISH, and DISH had no opportunity to cure the surprise. The "rules of expert disclosure are designed to allow an opponent to examine an expert opinion for flaws and to develop counter-testimony through that party's own experts." *S. States Rack & Fixture, Inc.*, 318 F.3d at 598; *see also BorgWarner, Inc. v. Honeywell Int'l, Inc.*, 750 F. Supp. 2d 596, 605-606 (W.D.N.C. 2010). Merely being able to cross-examine an expert on new opinions is not the ability to cure. *S. States Rack & Fixture, Inc*., 318 F.3d at 598.

DISH sought to rebut Ms. Verkhovskaya's new testimony with testimony from its own expert, but the Court precluded it. In contrast to the broad latitude allowed to Ms. Verkhovskaya, the Court required DISH's counsel to provide page and paragraph cites from Dr. Debra Aron's report for every bit of testimony that Dr. Aron offered. *See, e.g.*, Jan. 17, 2017 Tr. at 8:8-19, 10:11-17, 14:3-17, 18:4-18, 37:5-16.

Plaintiff offered no justification for his failure to disclose, and there is none. His TCPA claim always required proof that calls were made to residential numbers on the Registry for at least 30 days at the time of the call. Yet, his expert's report neither opined that the telephone numbers were residential, nor that they were on the Registry, at the time they were called. Ex. A. And, the report did not disclose any basis to opine that telephone numbers not identified as businesses by SSN or LexisNexis could or should

---

the first time at trial, without any prior steps to make or disclose corrections. *See* Jan. 13, 2017 Tr. at 98:13-20 ("I'm doing it now").

necessarily be considered residential. Ex. A. That foundation for her opinion—that she considered the LexisNexis business identifications to be dispositive—was material to the opinions she offered at trial and should have been explicitly set forth in the report under Rule 26(a). Jan. 12, 2017 Tr. at 182:2-10.

Plaintiff also knew, from DISH's pretrial disclosures (Doc. 165-5) (which contained summary exhibits based on the LexisNexis data that the Court precluded DISH from using at trial) as well as from the parties' stipulation on categories of telephone numbers in the LexisNexis data (Doc. 277), that DISH planned to cross-examine Ms. Verkhovskaya regarding LexisNexis information that she had said was not considered. Over DISH's objection, the Court allowed Plaintiff to preemptively address DISH's potential cross-examination, and provide direct examination opinion testimony that had not previously been disclosed. Jan. 13, 2017 Tr. at 10:22-18:25. In the course of that direct testimony, Ms. Verkhovskaya contradicted her deposition testimony, and claimed specifically to have used LexisNexis information previously "not used" to conclude that telephone numbers contained in each and every distinct stipulation category were more likely than not residential.[7] Jan. 13 2017 Tr. at 11:1-18:25.

[7] At deposition, Ms. Verkhovskaya testified that she did not analyze the residential column. Ex. B (Dep. Tr. at 110:7-11) ("Yep, that's not the column we analyzed for this case."). At trial, she testified that she did in fact take that residential column into account. Jan. 13, 2017 Tr. at 93:4-94:16. At deposition, Ms. Verkhovskaya testified that she did not look at the government column. Ex. B (Dep. Tr. at 110:17-20) ("[W]as that a field you looked at for your work on this case?" "No."). At trial, Ms. Verkhovskaya testified that she did use the government column. Jan. 13, 2017 Tr. at 49: 1-16. At deposition, Ms. Verkhovskaya testified that she did not use the date limitation columns. Ex. B (Dep. Tr. at 116:20-117:16) ("Those are the dates that LexisNexis utilizes for their

The Court conceded the problematic nature of this new testimony with respect to the stipulated call categories, despite having declined to preclude or strike it, later stating, "[m]aybe I shouldn't have done that" (Jan. 17, 2017 Tr. at 17:4-17) and "[p]erhaps I shouldn't have let it in unless and until you all actually put your evidence on challenging it. . . ." *Id.* at 21:4-8. Indeed, the testimony should not have come into evidence.

2. Erroneous and Prejudicial Limitation on Dr. Fenili's Testimony

Notwithstanding that it was an essential element of Plaintiff's claims to prove that any cellphone numbers at issue were primarily used for residential purposes, the Court barred DISH's expert witness, Dr. Robert Fenili, from opining with respect to cellphones and the inherent difficulties attendant to ascertaining whether a cellphone is used for residential or business purposes. The Court ruled that Dr. Fenili's opinions on cellphones had "limited probative value and significant risk of confusion." Doc. 222 at 2. DISH respectfully submits that that ruling was in error. Dr. Fenili would have testified that, unlike for landline numbers, he is not aware of any directory or publicly available information that determines whether a cellphone is used primarily for residential or business purposes. His testimony was necessary to rebut Ms. Verkhovskaya's surprise assertion at trial that LexisNexis could identify all business cellphones, (Jan. 12, 2017 Tr. at 182: 2-10) and her assertion that whether or not a number is cellular has "no bearing" on whether that number is residential or business, Jan. 13, 2017 Tr. at 18:10-16. The exclusion of this testimony prevented DISH from demonstrating Plaintiff's failure to

internal use, but we did not use those dates…"). At trial, Ms. Verkhovskaya testified that she did take those dates into account. Jan. 13, 2017 Tr. at 96:22-98:20.

meet his burden of proof as to wireless numbers. Thus, Dr. Fenili's expert opinion was highly probative on the issues to be decided by the jury, as set forth in the jury instructions and on the verdict form, and carried no risk of confusion. The Court declined to reconsider its ruling following Ms. Verkhovskaya's testimony. Jan. 17, 2017 Tr. at 67:20-21 ("I ruled it was excluded on cell phones. I'm going to stick with that.").

D. Plaintiff Counsel's Prejudicial References to Document not in Evidence During Closing Arguments

DISH should be granted a new trial because, during his closing, Plaintiff's counsel quoted from, and improperly published to the jury, a hearsay declaration from Sophie Tehranchi that was not in evidence. Jan. 18, 2017 Tr. at 12:18-13:4. Plaintiff's counsel's misconduct "violated a fundamental rule . . . , that argument is limited to the facts in evidence," *U.S. v. Wilson*, 135 F.3d 291, 298, 302 (4th Cir. 1998), and improperly influenced the jury, warranting a new trial. *Ray v. Allergan, Inc.*, 863 F. Supp. 2d 552, 567 (E.D. Va. 2012) (granting new trial where counsel made improper and prejudicial comments during closing).

Counsel published the Tehranchi declaration to the jury and quoted her out-of-court statement that "[f]rom 2010 through 2011, all calls made through Five9 platform were for the purpose of marketing DISH products and soliciting DISH ordered by Satellite Systems. That's the evidence. These calls were on behalf of DISH." *Id*. at 12:22-13:1. Counsel also quoted Ms. Tehranchi's out-of-court statement that "Satellite Systems was an exclusive DISH dealer during 2010 and '11 and as such did not make any telemarketing calls soliciting any products other than DISH." *Id.* at 13:2-10.

The Court's curative instruction was vague and confusing and did not erase the prejudice to DISH. *See Wilson*, 135 F.3d at 302 (holding that curative instruction "was insufficient to cause the jury to disregard the specific argument" and reversing conviction). Although the Court instructed the jury to disregard the exhibit, which it identified as "Sophie Tehranchi's affidavit," it simultaneously encouraged the jury to "consider her testimony." Jan. 18, 2017 Tr. at 40:21-41:10. This instruction engendered more confusion than clarity.

E. The Excessive Damages Award Violates DISH's Due Process Rights

Substantive due process concerns have caused courts to express "profound disquiet" in a system that permits the "imposition of liability" in thousands of cases based upon the results of a non-representative sample of plaintiffs. *See In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1020-21 (5th Cir. 1997) ("Our substantive due process concerns are based on the lack of fundamental fairness contained in a system that permits the . . . imposition of liability in nearly 3,000 cases based upon results of a trial of a non-representative sample of plaintiffs."); *In re Fibreboard Corp.*, 893 F.2d 706, 710-11 (5th Cir. 1990) (vacating trial order to extrapolate damages from sample of 41 claims to pool of 2,990 claims, where there are "disparities among 'class' members"). Where the underlying sample consists of only *one recipient*—the class representative—these due process concerns become even more pressing.

Here, DISH respectfully submits that the Court erred in permitting Plaintiff—over DISH's objections (*see, e.g.*, Doc. 228)—to aggregate the claims for 51,119 distinct telephone calls and apply a uniform per-call damages award to that number. As a result,

DISH was deprived of its right to present individual defenses to each claim, including the relative level of harm that might have been caused by each call and whether some of these class members presented cognizable legal claims at all. This error was not harmless, as the jury decided to award $400 per call without hearing any of these defenses except as applied to Dr. Krakauer. Accordingly, DISH is entitled to a new trial on the issue of damages.

In addition, a new trial is an appropriate remedy when a verdict is excessive in light of the evidence. *Cline*, 144 F.3d at 304 (granting a new trial nisi remittitur because of an insufficiency of evidence supporting compensatory damages award and because evidence of plaintiff's harm and defendant's indifference did not support excessive punitive damages award). Because the evidence presented was insufficient to support a verdict of $400 per violation, *supra* Part II, the damages award is excessive and the Court should, in accordance with its duty and the interests of justice, order a new trial.

CONCLUSION

For the reasons set forth herein, DISH respectfully moves this Court to order a new trial.

Dated: March 7, 2017

Respectfully submitted,

ORRICK, HERRINGTON & SUTCLIFFE LLP

By: /s/ Peter A. Bicks

Peter A. Bicks
Elyse D. Echtman
John L. Ewald

51 West 52nd Street
New York, NY 10019-6142
Telephone: (212) 506-5000
pbicks@orrick.com
eechtman@orrick.com
jewald@orrick.com

/s/ Eric Larson Zalud
Eric Larson Zalud
BENESCH, FRIEDLANDER, COPLAN & ARONOFF LLP
200 Public Square, Suite 2300
Cleveland, OH 44114
Telephone: (216) 363-4588
ezalud@beneschlaw.com

/s/ Richard J. Keshian
Richard J. Keshian
North Carolina Bar No. 10681
KILPATRICK, TOWNSEND & STOCKTON, LLP
1001 West 4th Street
Winston-Salem, NC 27101
Telephone: (336) 607-7322
rkeshian@kilpatricktownsend.com

Attorneys for Defendant DISH Network L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2017, I electronically filed the above document with the Clerk of Court using the CM/ECF system, which will send notifications of such filing to all counsel of record.

/s/ Peter A. Bicks

Peter A. Bicks
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019-6142
Telephone: (212) 506-5000
pbicks@orrick.com
eechtman@orrick.com
jewald@orrick.com

Attorneys for Defendant DISH Network L.L.C.